Electronic Money Association
68 Square Marie-Louise
Brussels 1000
Belgium
www.e-ma.org

Mai Santamaria
Shareholding and Financial Advisory Division
Department of Finance
Tithe an Rialtais, Sráid Mhuirfean Uachtarach, Baile Átha Cliath 2, D02 R583
Government Buildings, Upper Merrion Street, Dublin 2, D02 R583

By online submission

15 September 2023

Dear Mai

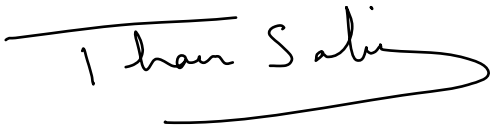
Re: Public Consultation on national discretion in MiCAR adoption

We welcome the opportunity to provide input to this Department of Finance consultation on the national discretions offered under MiCAR. The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. It has been operating for over 20 years and has a wealth of experience regarding the regulatory framework for electronic money, payments, and cryptoassets, together providing a wide range of payment-related services, including online payments, card-based products, electronic vouchers, and mobile payment instruments.

Our members include leading payments and e-commerce businesses worldwide, incl. FinTech and BigTech, and increasingly cryptocurrency exchanges and other cryptocurrency related products and services. The vast majority operate across the EU, most frequently on a cross-border basis, and a large number have obtained – or are applying for - licences from the Central Bank of Ireland to provide domestic and cross-border services from Ireland. A list of current EMA members is provided at the end of this document.

We would be grateful for your consideration of our comments, which are set out below.

Yours faithfully



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA Response to Consultation

Discretion 1 – Public disclosure of inside information Article 88 (3)

Article 88(2) of MiCAR permits issuers, offerors or persons seeking admission to trading of a crypto-asset to delay public disclosure of inside information providing certain conditions are met, such as where a disclosure of the information would prejudice the legitimate interest of the issuer, offeror or persons seeking admission to trading, and where the delay in disclosure is not likely to mislead the public.

Article 88(3) states that when an issuer, offeror or someone seeking admission to trading has delayed the disclosure to the public of inside information, they are obliged to inform the NCA about the delay of disclosure and provide an explanation. The Regulation also contains a discretion to Article 88(3) that allows for Member States to provide that a record of such an explanation is to be provided only upon the request of the NCA.

a) Should Ireland exercise this discretion?

Ireland should strongly consider exercising the discretion outlined in Article 88(3). This discretion allows Member States to waive the obligation to provide immediately after the delayed disclosure of inside information a written explanation of how the related conditions set out in Article 88(2) have been met and, instead, require a record of such an explanation to be provided only upon a request by the competent authority. Exercising this discretion will likely ensure efficiency of process and lessen the administrative burden on the NCA or other such authorities, while also reducing the extensive compliance requirements placed upon the VASP.

There are a number of other factors that are important to consider, particularly that of regulatory alignment and a need to ensure that the decision aligns with broader regulatory goals including the importance of market integrity, investor protection, and transparency within the cryptoasset sector. Careful consideration should be given to the potential impact on the market - while delaying disclosure may be permissible under specific conditions, it should not be employed in a manner that could harm market participants or deceive investors.

The delayed disclosure of inside information is already part of the Irish regulatory framework as applicable to financial instruments. As such, it may be prudent to apply an approach to the crypto asset sector in the same way as it applies to markets for financial instruments, given the broader regulatory goals, including market integrity and investor protection are the same.

b) How should this discretion be transposed in Ireland?

The transposition of this discretion will need to align with ESMA (European Securities and Markets Authority) RTS and ITS.. Article 88 (4) calls upon ESMA to produce implementing technical standards to ensure uniform application, and as such alignment of the delayed disclosure of inside information is necessary to ensure Ireland’s approach is consistent with that across the EU.

There is also a need to consider guidance: if Ireland decides to use the discretion under Article 88(3), it should be accompanied by regulatory guidance to ensure market clarity and transparency. Clear communication will be required to ensure awareness and understanding among market participants regarding the discretion's existence and application.

Discretion 2 – Administrative penalties and other administrative measures Article 111 (1)

Article 111(1) of MiCAR provides a Member State discretion in relation to administrative penalties and other administrative measures. This article allows Member States to provide for NCAs to have the power to take appropriate administrative penalties and other administrative measures in relation to a number of infringements. This discretion relates to Member States not laying down the administrative penalties where the associated infringement is subject to criminal penalties in national law.

Article 111(6) permits Member States to supplement the powers given in 111(2) to (5) and allow Member States to impose higher levels of penalties than those provided for in the Article.

In respect of the criminalising of certain breaches, it is important that an option exists for such matters to be pursued by the Central Bank as administrative breaches ('prescribed contraventions') and for the Central Bank to be able to bring Administrative Sanctions Procedure (ASP) proceedings in respect of such breaches.

a) Should Ireland exercise this discretion?

Ireland should carefully consider its legal framework, cross-sector regulatory alignment, and EU notification requirements when deciding on administrative penalties under Article 94. The exercise of this discretion will depend on whether there are existing criminal penalties to cover the infringements already, and Irish legal framework should be reviewed to determine if this is the case.

Another consideration will be an evaluation of whether criminal penalties alone suffice for deterrence and investor protection, or if administrative penalties could enhance regulatory enforcement. Regarding administrative penalties, a clear distinction is required between administrative penalties/ fines and other administrative measures. The former should not be applied to individuals in addition to criminal penalties, as these carry a heavier weight. In contrast, certain administrative measures may have to be taken as a matter of urgency e.g., to address governance deficiencies at the level of the firm. In such cases it must be possible for the regulator to pursue administrative measures in parallel to criminal proceedings directed at the individual.

If the specified infringements already have criminal penalties in place by June 30, 2024, then additional administrative penalties may not be needed, and in this case the exercise of this discretion may be advisable. It should be noted that if Ireland opts not to introduce administrative penalties due to existing criminal penalties, it must promptly and comprehensively notify the European Commission, ESMA, and EBA.

Ireland should also consider the approach taken by other member states to ensure a uniform application of rules, including penalties, across the EU. This can help to avoid the potential for regulatory arbitrage, promote a unified approach to consumer protection, and support the overall trust in the EU crypto markets.

b) How should this discretion be transposed in Ireland?

Transposing Article 94 of MiCAR into Irish law requires careful consideration of existing legal frameworks, regulatory objectives, and EU compliance. The decision should be well-documented, transparent, and involve stakeholder input to ensure effective regulatory enforcement in the crypto-asset market.

A necessary starting point would be to review whether specified infringements in Article 94 already carry criminal penalties under the Irish legal framework, thus ensuring the existing framework is sufficient. If existing criminal penalties cover the infringements, then a consideration should be made to adjust to align with MiCAR.

Following this, and if determined that new administrative penalties do not need to be introduced due to existing equivalent criminal penalties, it is required to notify the EU Commission, ESMA, and then EBA with detailed information about Ireland's criminal law addressing these infringements, in line with EU notification requirements.

Throughout the process, clearly documenting all decisions and rationale for not introducing administrative penalties will ensure transparency for Ireland's regulatory approach towards the cryptoasset market. We would also recommend the establishment of mechanisms to monitor and assess the effectiveness of criminal penalties in addressing infringements.

Discretion 3 – MiCAR transition period for existing CASPs Article 143

Article 143 provides a transition period for CASPs that are providing their services in accordance with national law prior to MiCAR applicability (29 December 2024). In Ireland, those CASPs will be those firms that have registered as Virtual Asset Service Providers with the Central Bank of Ireland under the European Union's Fifth Anti-Money Laundering Directive ('5AMLD') by 29 December 2024.

The transition period permits these CASPs to continue to provide services for up to 18 months after the date of application of MiCAR (i.e., to June 2026), or until they are granted or refused an authorisation.

While the default position in MiCAR is that these CASPs can avail of a transition period, the text provides discretion for Member States to either not apply this transition period or to reduce its duration in circumstances where they consider that their national regulatory framework is less strict than that set out in MiCAR. A reduction in the length of the transition period is also envisaged in Recital 114 where Member States that do not currently have strong prudential requirements for CASPs should be permitted to either not apply or reduce the 18-month transition period.

a) Should Ireland exercise this discretion?

Ireland should not exercise its discretion to reduce the transitional period for CASPs after the date of application of MiCAR. This will promote uniform application of the rules, prevent regulatory arbitrage, and mitigate the potential for market disruption to the benefit of consumers, CASPs, and supervisors.

Under the existing Central Bank of Ireland registration in line with the European Union's Fifth Anti-Money Laundering Directive (5AMLD), there is already a requirement for CASPs to comply with a range of requirements and be subject to regulatory oversight. Given this, alongside the resource and administrative challenges associated with implementation of a new regime, Ireland should not seek to reduce the extended transition period. This would allow it to leverage the existing regulatory relationship with CASPs, and provide adequate time for both CASPs and the regulator to prepare for compliance with, and application of, the new regime. It would assist in establishing a mutually beneficial dialogue and help ensure authorisation and the move to on-going

supervision is based upon a good understanding of the CASP's activities and its business and operational model.

Ireland may want to consider a review and assessment of the national regulatory framework against MiCAR to determine if it is sufficiently robust. In addition, a further review will be required of the existing domestic prudential requirements and their relative strength. Allowing for an extended transition period could be combined with interim powers for the regulator to issue directions and take firm-specific measures addressing and mitigating any perceived risk.

It may also be worth considering whether regulated payment services and/or e-money service providers should also benefit from such a transition regime. EMIs must meet a high regulatory standard under existing financial services law, including prudential, conduct of business and financial crime requirements that are based in EU law and have similar authorisation requirements. We suggest that EMIs offering cryptoasset services, and who may be subject to MICAR, should also benefit from such a transition regime.

b) How should this discretion be transposed in Ireland?

As indicated above, Ireland should not seek to transpose this discretion and should rather allow for an extended transition period for CASPs as provided under MiCAR.

c) How long should the transition period last?

The transition period should last for the full 18 months as provided for under Article 143. As set out above and in line with the intention underlying Article 143, the full transition period will be mutually beneficial for the authorisation process and the move to full application of the new regime and ongoing supervision of CASPs. It will also minimise the potential of interruptions to CASPs' operations or activities, which could adversely impact their customers.

Finally, such an approach will help to ensure that the Central Bank of Ireland has sufficient time to design and implement its regulatory framework, including the related operational arrangements for ongoing supervision in line with MiCAR requirements, and provide them with more opportunity to assess applications from CASPs to determine whether they should be authorised or refused.

Discretion 4 – Simplified procedure Article 143 (6)

Article 143(6) contains a provision that Member States may apply a simplified procedure for applications submitted between the date of the application of MiCAR (30th December 2024) and 18 months after the date of application of MiCAR (June 2026). This provides an opportunity for NCAs that have an existing crypto-asset regulatory regime to leverage information already gathered, thus simplifying the procedure, and potentially shortening the application time.

Under this procedure, the NCA will still need to confirm that all relevant aspects of MiCAR are being complied with.

a) Should Ireland exercise this discretion to implement a simplified regime?

Ireland should exercise this discretion to implement a simplified regime. This will allow for the existing regulatory relationship as part of the 5AMLD registration requirements to be leveraged.

As highlighted previously, it is important to minimise potential interruptions to existing cryptoasset businesses for the benefit of consumers who are utilising their services - CASPs may struggle with the administrative burden of having to undergo a full authorisation application from scratch, which could impact their day-to-day operations.

It should also be highlighted that there are significant overlaps in the requirements of 5AMLD and MiCAR. Much of the information required under MiCAR will already have been provided to the Central Bank of Ireland when it assessed applications for registration from these CASPs. Therefore, the implementation of this discretion could help to prevent the duplication of work and effort on the part of CASPs.

In addition to this, there is also a significant resource and effort requirement on the Central Bank as the regulator to assess new applications in line with MiCAR requirements. The use of this discretion may allow the Central Bank to more carefully allocate resources and maintain capacity for effective supervision of CASPs, as opposed to dedicating extensive resources to authorisation assessments.

b) How should current regimes be evaluated and by whom?

The evaluation of cryptoasset regulatory regimes in Ireland should be a collaborative effort involving various stakeholders and organisations with specific roles and responsibilities. Chief amongst them will be the Central Bank of Ireland as the primary regulator of cryptoassets within the jurisdiction, who will ultimately be responsible for confirming that all relevant aspects of MiCAR are being complied with. The Irish Department of Finance will also play a critical role as the authority responsible for economic and financial policy, and as such it may want to consider the broader economic implications of cryptoasset regulations.

It may also be necessary to include the European Supervisory Authorities in the evaluation process, to mitigate the potential for assessments to go via the European Court of Justice.

Aside from the regulators, it may be prudent to engage directly with market participants. This includes industry stakeholders such as CASPs and EMIs offering CA services to offer views and insights based on their experience to date, alongside industry groups such as the Irish Blockchain Association and the Electronic Money Association. A public consultation may be an appropriate forum for this outreach.

Finally, external experts and academic institutions may be a useful source of independent assessments and research on existing regulations.

c) How should divergent opinions on the compliance of current regimes be challenged?

Divergent opinions on the compliance of current regimes can be challenged and comprehensively resolved through a structured and inclusive process, while maintaining the regulatory framework's integrity and effectiveness. This will require a collaborative approach incorporating multiple stakeholders.

A potential avenue for this is the establishment of a Regulatory Review Body, which would be an independent, impartial body with experts, legal professionals, industry representatives, and stakeholders trusted by all parties.

A key principle will be the transparency of the process, which will ensure trust and engagement in spite of diverging opinions. It is necessary to standardise and document the policies and procedures that will apply and create consistency of process and consistency of approach.

Finally, consideration should be given to the establishment of conflict resolution mechanisms, appeals processes and mediation and arbitration instruments in instances where divergent opinions cannot be resolved.

Members of the EMA, as of September 2023

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Airwallex (UK) Limited
Allegro Group
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American Express
ArcaPay UAB
Banked
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network EMEA Limited
Boku Inc
Booking Holdings Financial Services International Limited
BVNK
CashFlows
Checkout Ltd
Circle
Citadel Commerce UK Ltd
Coinbase
Contis
Corner Banca SA
Crypto.com
eBay Sarl
ECOMMPAY Limited
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Facebook Payments International Ltd
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